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Curing the Cost Disease: Legal Education, Legal Services, and the Role of Income-Contingent Loans

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Curing the Cost Disease: Legal Education, Legal Services, And the Role of Income-Contingent Loans

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Abstract

The costs of both legal education and legal services have been rising steadily for decades. This is because they share a common root: the constant above-inflation growth in the cost of labor-intensive goods and services known as the “cost disease.” The cost disease story roots cost growth not in market failure or bureaucratic waste, but in natural, even healthy, economic forces—productivity and wage growth. Because the source of this cost growth is productivity growth, the nature of the cost disease is such that an economy as a whole can afford these rising costs. But in a world of deep income inequality, the costs must be socialized, to be shared collectively. I argue here that the Income-Driven Repayment program for student loans is a mechanism for partially socializing the costs of both legal education and legal services, while still maintaining the vital independence of both law schools and the bar. I also take a critical look at the Public Service Loan Forgiveness program, counter-intuitively arguing that it has serious flaws in its goal of serving the broader public interest.

I. Introduction

An odd feature of the debate about the role of legal education in the United States is the simultaneous broad acceptance of the claim that we have too many law schools and too many law students,¹ and also of the claim that our country has a severe problem with access to justice.² The knee-jerk assumption that there are not enough jobs for law school graduates is belied by the fact that likely millions of citizens interact with the legal system—with both state and private

¹ See, e.g., Steven J. Harper, *Too Many Law Students, Too Few Jobs*, N.Y. TIMES (Aug. 25, 2015), <https://nyti.ms/1NyhT5>; Greg Toppo, *Why You Might Want To Think Twice Before Going to Law School*, USA TODAY (June 28, 2017), <https://www.usatoday.com/story/news/2017/06/28/law-schools-hunkering-down-enrollment-slips/430213001>; Eric Posner, *The Real Problem With Law Schools: Too Many Lawyers*, SLATE (April 2, 2013), http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/04/the_real_problem_with_law_schools_too_many_lawyers.html.

² See, e.g., LEGAL SVCS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017), available at: <https://www.lsc.gov/justicegap2017> (finding that “86% of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help”).

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parties—without adequate counsel and representation. We assume some number of law schools will have to close even as many individuals and families deal with some of the most important legal aspects of their lives, such as immigration, family, domestic violence, disability, veterans' benefits, and housing issues, without adequate representation, or even any representation at all. Yes, many graduates of lower-ranked law schools struggle to find legal jobs, but if they walked into family court and asked who needs a lawyer, many hands would shoot up.

What explains this disconnect? There is an unstated qualifier when we say that there are not enough law jobs. What is really meant is that there are not enough law jobs *that could pay enough to make the investment in a law degree worthwhile*. Here, I mean investment in the broadest sense, including the opportunity of cost of not choosing a different career. But for purposes of this article, I also mean in it the narrow sense of the monetary cost of a legal education. There are many steps that our country would have to take to make justice more available to more people, but one of them is to make legal education more affordable, so as to encourage more people to study law and join the bar. Another is to make legal services themselves more affordable, so that more people would be willing to get counsel when they need it.³

But making both legal education and legal services more affordable is, as we have found, incredibly difficult. And this is not because of some broad systemic failure in these industries, but rather because of natural, even positive, economic forces. As labor-intensive services, both legal education and legal services are subject to an economic phenomenon known as “Baumol’s cost disease,” which observes that goods and services with no or low growth in labor productivity will see prices rise faster than inflation over time. The “disease” moniker underscores that the rising prices are troubling for these services, and also that

³ For purposes of narrative simplicity, this article will generally refer to the lack of legal services in terms of direct representation in legal matters, such as cases in family or immigration court, or in administrative proceedings for government benefits. But the argument also extends to indirect services. For example, our public/private “hidden” welfare state depends heavily on privately run programs, such as employer-provided health care and retirement plans, unemployment insurance, tort liability, and labor and workplace protections, all of which at some level requires the administration of competent lawyers. *See generally, e.g.*, JACOB HACKER, *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND SOCIAL BENEFITS IN THE UNITED STATES* (2002); JENNIFER KLEIN, *FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA’S PUBLIC-PRIVATE WELFARE STATE* (2003). Moreover, many of our public transfer programs are through the tax system, for example the earned income and child tax credits, the successful administration of which again necessitates a role for attorneys to help navigate the interaction between individuals and the state. *See, e.g.*, CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES* (1997). And, given the increasing and unidirectional growth in the complexity of our world, these demands will only increase. *See also* John R. Brooks, *Quasi-Public Spending*, 104 GEO. L.J. 1057 (2016).

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they are caused by something deeper than, e.g., a misallocation of resources. But as I explain in more detail in Part III below, the causes of the disease are actually positive trends, namely economy-wide growth in productivity and wages. Quite simply, if the wages for those who work in legal education and legal services continue to rise, so will the prices of those services (barring the creation of some industry-disrupting technology).

However, the silver lining of the cost disease is that it has a cure. That is, as long as the price growth in legal education and legal services is driven by increases in productivity elsewhere in the economy and in wages overall, the economy as a whole can also afford the price increases in the goods and services afflicted by the cost disease. But since the benefits of productivity and wage growth are not evenly distributed, managing the cost disease requires some socialization of the costs. There are, of course, any number of tools we could use to do this, but in the context of legal education, our primary tool for socializing these costs is the Income-Driven Repayment (“IDR”) program for federal student loans.

From 2008 to 2015, through a series of statutory and regulatory changes, Congress and the Obama Administration dramatically reshaped the student loan system, and by extension our country’s system of higher education finance generally.⁴ By 2018, 90% of all student lending is directly from the federal government,⁵ and all of those loans (and most earlier loans) can, using one of the IDR programs, be paid back on an income-contingent basis, typically as 10% of discretionary income for 20 years, followed by forgiveness of the remaining loan balance. In effect, all higher education, including legal education, can be paid for by sharing a portion of one’s income with the federal government, much like we use the income tax to pay for other government-provided goods and services.

IDR has quietly become a massively important part of higher education finance. As of the second quarter of 2018, \$388.6 billion of student debt owed by nearly 7 million borrowers is in IDR—46% of all debt and 29% of all borrowers currently in repayment.⁶ And because of the way these rules are written, income-contingent loans are particularly important in funding law

⁴ See John R. Brooks, *The Case for More Debt: Expanding College Affordability By Expanding Income-Driven Repayment*, 2018 UTAH L. REV. 847, 849-66 [hereinafter *Case for More Debt*] (discussing legislative and regulatory history); John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO L.J. 229, 251-53 (2016) [hereinafter *Income-Driven Repayment*] (same).

⁵ COLL. BD., TRENDS IN STUDENT AID 2017 13 fig. 4 (2017), <https://trends.collegeboard.org/student-aid> (Total Federal and Nonfederal Loans in 2016 Dollars, 1995–1996 to 2016–2017).

⁶ Federal Student Aid, U.S. Dep’t of Educ., *Direct Loan Portfolio by Repayment Plan*, <https://studentaid.ed.gov/sa/about/data-center/student/portfolio>.

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school and other graduate and professional education. While an undergraduate can borrow at most \$57,500 from the federal government (and typically closer to \$27,000)⁷, a graduate or professional student can borrow up to the full cost of attendance.⁸ That amount is set by each school and includes costs of living; it can be nearly \$100,000 per year for law school.⁹

Because of the intimate connection between legal education and legal services, and the similar effects of the cost disease on each, this article calls for considering income-contingent student loans not just as a way to help individuals afford law school, but as at least part of a broader set of policies to increase access to justice in our country. This article proceeds as follows. Part II shows the rising costs of both legal education and legal services, and how they have followed similar paths. Part III roots this cost growth in the cost disease, and explains how the cost disease works and what its implications are, particularly for legal education and legal services. Part IV explains why managing the cost disease requires some socialization of the costs, i.e., spreading the costs widely across a society, and in progressive way. Part V argues that income-contingent loans partially serve this role. This Part also takes a critical look at the Public Service Loan Forgiveness program, counter-intuitively arguing that it has serious flaws in its goal of serving the broader public interest. Part VI concludes.

II. Rising Costs

In this Part I briefly review some of the data regarding rising costs of both legal education and legal services. At least for the period of 1999 to 2013, for which we have the fullest data, the costs appear to have risen roughly the same amount, around 75% over that 15-year period. (An important exception is public law school tuition, about which more below.) This growth is significantly faster than overall inflation (CPI grew around 40% over that period), or even the inflation indexes that track higher education costs (which grew around 57% over that period).

What follows is not intended as a rigorous statistical analysis, in part because it is difficult to get a truly accurate picture of the cost of legal education due to a lack of public data, and also because there will always be a number of confounding factors, not the least of which is that the United States faced two

⁷ See *infra* notes 61-62 and accompanying text.

⁸ See *infra* note 62 and accompanying text.

⁹ See, e.g., Columbia Law School, *Costs and Budgeting: Standard Cost of Attendance*, <https://www.law.columbia.edu/financial-aid/costs-and-billing/costs-budgeting> (2018-19 cost of attendance of \$97,850); NYU Law School, *Student Expense Budget*, <http://www.law.nyu.edu/financialaid/budgetandbudgeting/studentexpensebudget> (2018-19 cost of attendance of \$96,845).

deep recessions during this 15-year period. Moreover, both legal education and legal services underwent significant structural changes during this time. What I want to illustrate is not so much rigorous numbers as broad trends, which I hope would be roughly the same in direction and magnitude regardless of particular statistical choices.

A. The Rising Cost of Legal Education

It is abundantly clear that nominal law school tuition and fees (i.e., listed tuition and fees before accounting for financial aid and other discounting)¹⁰ have been rising rapidly for decades. According to the American Bar Association, in-state tuition for public law schools rose from \$2,006 in 1985 to \$23,879 in 2013, an increase of over 1000% over 29 years (an average annual growth rate of about 9.3%).¹¹ Private law school tuition and fees rose from \$7,526 to \$41,985, an increase of over 450% (6.35% per year).¹² Over the 1999-2013 period, these growth rates were 8.62% and 5.18%, respectively. By contrast, inflation, as measured by the Consumer Price Index, has averaged more like 2.43% per year during that period.¹³ (Table 1 summarizes these and other growth rates.)

But focusing only on schools' posted *gross* tuition rates is a mistake, since schools have always discounted their tuition, based on both student need and merit. Moreover, school discounting appears to be increasing in recent years, slowing the overall growth rate in *net* tuition. Data is hard to come by, since schools are fairly tight with their proprietary data. The ABA published discounted net tuition data for public and private law schools for the years 1999, 2004, 2009, and 2013, which show discount rates for public schools rising from 19% to 30% and for private schools from 15% to 26%.¹⁴

Figure 1 shows the growth of gross and net tuition over these periods (with a shorter period for net tuition, covering 1999-2013, the range of years that the ABA's discounting information covers). To generate the chart, I simply assumed linear growth in discount rates between the years for which we have data. The chart shows that the growth rate for net tuition is slightly slower than the growth rate for gross tuition, with the rise in discount rates partially offsetting the more accelerated growth of gross tuition in recent years. Net tuition for public schools rises at an average growth rate of 7.65% and for private schools at 4.14% during

¹⁰ For simplicity I just refer to "tuition" hereafter unless otherwise specified.

¹¹ American Bar Association, Law School Tuition, *available at*: https://www.americanbar.org/groups/legal_education/resources/statistics.html.

¹² *Id.*

¹³ Bureau of Labor Statistics, CPI-All Urban Consumers (Current Series), *available at*: <https://www.bls.gov/cpi>.

¹⁴ Author's calculations based on AMERICAN BAR ASSOCIATION, TASK FORCE ON THE FINANCING OF LEGAL EDUCATION, Report 22-30, figs. 4a, 4b, 5a, 5c, *available at*: https://www.americanbar.org/groups/legal_education/committees/aba-task-force-on-the-financing-of-legal-education-.html.

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this period. The rates are still high, but materially slower than that the 8.62% and 5.18% rates for gross tuition.

The faster rise of public law school tuition (net and gross) deserves some further discussion. As we will see below, private school net tuition tracks more closely with the growth rate for legal services. But public law school tuition, even net of a generous average 30% discount rate, has risen at a substantially higher rate. (Figure 2, which is scaled to have 1999=100 shows clearly how much public net tuition growth is an outlier compared to the growth in other costs.) The causes of cost growth in legal education, and in higher education in general, are heavily debated, but one cause that seems fairly certain for public schools is the decline in direct state government funding for higher education.¹⁵ This is particularly true for law schools, many of which have become essentially private institutions, with barely any government support at all. This confounds the data, since nominal tuition data not only reflects increases in the total cost of providing legal education, but also a shift in the source of payments, from state governments to students. Since private law schools never had state funding to lose, their tuition growth likely tracks more closely to overall cost growth than public school tuition does.

B. Rising Cost of Legal Services

The rising cost of legal services receives much less attention (at least among law professors) than the rising cost of legal education, but it is still a very real, and important phenomenon. But it is also more difficult to track, because of the diffusion of legal service providers, and of those who pay for legal services. Purchasers of legal services include everyone from corporations paying over \$1000 per hour for white shoe New York firms to local governments paying court-appointed attorneys, and even to in-house counsel.

Since I am more interested in growth rates than absolute costs, I am using the data from the Producer Price Index published by the Bureau of Labor Statistics.¹⁶ The BLS data only goes back to 1997, but there appears to be a methodological change in 1999, so I just look at the index from 1999 to 2013. Over this period, the PPI index for legal services grew at an average annual

¹⁵ See, e.g., Douglas A. Webber, *State Disinvestment and Tuition at Public Institutions*, 66 ECON. ED. REV. 1, 3 (2017) (finding that has much of 41.2% of public tuition increases is due to state disinvestment); Sandy Baum et al., *Tuition and State Appropriations: Using Evidence and Logic to Gain Perspective*, Urban Institute Report (2018) (summarizing research).

¹⁶ Even if one might have doubts about the components of the index (something I do not have the expertise to judge), my hope is that any errors are at least consistent over time, so that growth in the index is still reflective of the growth in overall costs.

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growth rate of 3.94%.¹⁷ As with legal education, this is a significantly faster than the growth in overall consumer prices, which averaged 2.43% over the period.¹⁸

C. Comparing Cost Growth in Legal Education and Legal Services

Figure 2 shows the relative increases in net tuition for public and private law schools and for legal services, alongside the increases in CPI and two measures of inflation in higher education, the Higher Education Price Index (“HEPI”)¹⁹ and the Higher Education Cost Adjustment (“HECA”),²⁰ for the period 1999-2013 and all scaled so that 1999=100 for all the cost measures.

As noted above, public law school net tuition is a clear outlier, in part because it reflects not just rising costs but also cuts in direct state government funding. But looking at the other measures shows higher education costs in general rising about one-and-a-half times faster than overall prices and both private law school net tuition and legal services rising at about twice the rate of inflation.

The key take-away here is the very similar growth trajectory of the cost of legal education and the cost of legal services. I discuss in the next section why it is not surprising, and even expected, for the costs of these two services to rise at similar rates. But we should also understand that if we think the rising cost of legal education is a crisis, then the very same logic applies to legal services as well. And because of the intimate connection between these two services, we should think about common solutions.

Table 1: Average Annual Growth Rates, 1999-2013

Public school, in-state listed (gross) tuition	8.8%
Private school listed tuition	5.18%
Public school net tuition	7.65%
Private school net tuition	4.14%
PPI for legal services	3.99%
Professor compensation (salary & benefits)*	3.81%

¹⁷ Bureau of Labor Statistics, PPI Industry Group Data for Legal Services, *available at*: <https://www.bls.gov/ppi/data.htm>.

¹⁸ See BLS, *infra* note 13. This is slightly slower rate than noted at note 13 because I am looking at the 1999-2017 period.

¹⁹ Commonfund Institute, Commonfund Higher Education Price Index, 2016 Update 3, tbl. a, *available at*: <https://www.commonfund.org/commonfund-institute/higher-education-price-index-hepi>.

²⁰ State Higher Education Executive Officers Assn., The Higher Education Cost Adjustment: A Proposed Tool for Assessing Inflation in Higher Education Costs 3, tbl. 1 (2017), *available at*: http://www.shceo.org/projects/shef/learn_more.

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Lawyer salaries (salary only)	2.81%
HEPI/HECA	3.31%
CPI-U	2.43%

* 1997-2011

Sources cited in text

III. Understanding the Cost Disease

While there are likely many and varied reasons for the rising costs of both legal education and legal services, a likely cause of at least some of that rise is simply that both are labor-intensive services, which in general see costs rise faster than inflation—an economic phenomenon often called “Baumol’s cost disease.”²¹ The cost disease helps to explain the ever-increasing costs of a number of goods and services in the economy, including health care, education, and government services like policing, firefighting, and social services.

I explain the cost disease briefly below, but at the outset it is worth noting that calling it a “disease” is a misnomer, as we will see. It is fundamentally a product of healthy economic forces, and furthermore cost increases caused by the cost disease are affordable by definition. The cost disease raises difficult public policy challenges, but it is ultimately a political, not economic, problem.²²

The essence of the cost disease is that as wages rise over time, industries that are not able easily to increase the productivity of their workers will see their prices rise along with wages. The clearest example is the one used by William Baumol and William Bowen in their first paper on the subject: live performing arts.²³ It takes the same number of actors the same amount of time to perform Henry IV Part I today as it did in 1600—the labor productivity of live theater actors and live musicians has barely budged in 400 years. Yet actors and musicians do not expect to earn 1600-era wages (even in real terms), since costs and standards of living are much higher today.

²¹ See, e.g., WILLIAM J. BAUMOL, *THE COST DISEASE: WHY COMPUTER GET CHEAPER AND HEALTH CARE DOESN’T* (2012).

²² I am not saying that *all* cost increases are healthy or appropriate. Cost increases driven by, e.g., mismanagement, rent-seeking, supply or demand shortages, etc., are real problems. I am just making the narrower point that cost increases *as a result only of the cost disease* are not inherently an economic problem, even if they can be a political or public choice problem. See William J. Baumol, *Health Care, Education and the Cost Disease: A Looming Crisis for Public Choice*, 77 PUB. CHOICE 17 (1993).

²³ William J. Baumol & William G. Bowen, *On the Performing Arts: The Anatomy of Their Economic Problems*, 55 AMER. ECON. REV. 495 (1965).

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The story gets a bit more complex when considering the source of wage growth. There is of course a lot that goes into the determination of wages, including the relative bargaining power of labor and capital. But the *ability* for firms to pay higher wages comes largely from improvements in labor productivity due to the investment of capital and from innovations and inventions. The capital and innovations let a given worker produce more output—through the use of tools, machines, technology, etc. At least some of that increased output will go to the worker in the form of higher wages.²⁴

But these wage increases do not only affect workers in these high-labor productivity industries. Upward pressure on wages in the high-productivity sectors cause wages to rise in low-productivity sectors as well, since all sectors have to draw from the same labor market.²⁵ But the low-productivity sectors do not have the same increase in output per worker. If their labor costs go up, the prices for the goods and services have to go up as well. In contrast, high-productivity sectors can often pay higher wages even as real prices for their goods and services fall.

Returning to the performing arts example, we can also see how innovation and productivity can counteract the cost disease. Inventions like audio and video recording, radio, movies, TV, and the Internet have made the creation and distribution of entertainment vastly more cost effective, so that a given performance can now reach millions of people at an affordable price. But this underscores the point that the key is technological innovation—for industries like education where technology is lacking, the cost disease continues to be dominant. Moreover, it also highlights that the innovation in question often involves substitution—e.g., switching from live to recorded performances. These are not necessarily equivalent products, and as long as there remains a demand for live performance (or live classroom teaching), the cost disease will continue to play a role.

A. Cost Disease in Legal Education

After live performing arts, education is perhaps the industry that best fits the cost disease story.²⁶ A given teacher or professor has a pretty hard upward bound on the number of students that he or she can teach—there is only so

²⁴ This is not to say that productivity necessarily leads to wage growth, and there is evidence that in recent decades much of the growth in output from labor productivity has accrued to owners of capital. See, e.g., Economic Policy Institute, *The Productivity-Pay Gap*, <https://www.epi.org/productivity-pay-gap>. But it remains the case that for there to be *any* real wage growth over time, labor productivity has to increase.

²⁵ See ROBERT B. ARCHIBALD & DAVID H. FELDMAN, WHY DOES COLLEGE COST SO MUCH? 36–37 (2011); BAUMOL, *supra* note 21, at 21 (“In the long run, wages for all workers throughout a country’s economy tend to go up and down together.”).

²⁶ See Brooks, *Income-Driven Repayment*, *supra* note 4, 239–42; see generally ARCHIBALD & FELDMAN, *supra* note 25.

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much time to grade papers and tests, and only so much room in a classroom or lecture hall. But teachers and professors still expect their wages to rise over time, and if those wages rise faster than inflation, then so will the costs of education generally.

To be sure, professors' salaries are not the only sources of cost increases in higher education. As schools have started providing a broader range of services, administrative and capital expenses have also risen. And, as in every industry, there is also likely a degree of waste and rent-seeking. But classes taught or led by professors remain the central product of higher education. According to Education Department data, total compensation (salary plus benefits)²⁷ for professors grew at around 3.8% a year between 1998 and 2011.²⁸ Good data on law professors specifically is hard to come by, but we can probably assume that law professors' salaries grew at a similar rate. This falls a bit short of the 4.14% average growth rate for private school net tuition, but is in the same ballpark, and substantially more than average CPI of around 2%.

It is worth noting that there are—of course—productivity improvements in higher education. For undergraduate education, the main ways that schools have tried to improve productivity are using cheaper labor, like graduate students and adjunct professors, and online courses. Neither of these have significantly broken through to law schools, but even if they do at some point, it is not clear at all that they would have the sort of productivity improvements that could substantially slow or reverse cost increases.²⁹ For one thing, they still rely heavily on labor. Even online courses still need graders, discussion leaders, and so on, and these workers would expect raises. Moreover, these interventions likely have a negative effect on quality, and delivering a lower-quality product at the same price is just as inflationary as delivering the same quality at a higher price. There will likely always be a demand for full-time professors teaching live in a classroom, and that product will remain expensive.

But even allowing for all the technological interventions that have improved teaching and research productivity—like digital research and communication, online course management, and computer technology in general—does not

²⁷ It is important to include the value of benefits since it is an increasingly important portion of overall compensation and because it has been rising faster than cash wages. *See infra* notes 35-36 and accompanying text.

²⁸ To calculate this I used salary data for full professors and average benefits per full-time faculty member, since NCES data did not separate benefits out by academic rank. I used full professor salary on the assumption that law schools generally rely on tenured faculty whose salaries are at the top end of overall faculty salaries. Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Digest of Educ. Statistics, tbls. 316.10 & 316.70 (2017), *available at* https://nces.ed.gov/programs/digest/current_tables.asp.

²⁹ For a fuller discussion of this point, *see* Brooks, *Income-Driven Repayment*, *supra* note 4, at 242-44.

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counter the cost disease story. The cost disease requires only *low* productivity growth, not none at all. As long as productivity lags behind wage growth, costs will continue to rise faster than inflation. Even the most techno-optimist visions of online or AI-driven education are unlikely to match the exponential growth in labor productivity we have seen in, say, agriculture, an industry which has gone from employing the majority of all workers in 1870³⁰ to virtually no one today,³¹ even while increasing output to enormous levels.

B. Cost Disease in Legal Services

The same basic story applies in legal services: a fundamentally labor-intensive exercise that has seen some technological innovations that improve productivity on the margin, but not on nearly the scale that would be required to slow or reverse real cost growth. Beyond the general labor-saving technologies, like email and word processing, innovations like online legal databases and text-analyzing discovery software have shortened the amount of time lawyers and other legal workers spend on these tasks. And we are told that an AI-driven future without lawyers is just around the corner. But the bedrock service provided by attorneys—representation in court and other legal proceedings—remains as labor-intensive as ever, and no conceivable technology can replace it. As with legal education, attempts to save money—e.g., by pushing people into arbitration or settlement, using do-it-yourself online services, or simply appearing *pro se*—likely mean a lower-quality product, and so do not actually address inflationary pressures.

While the Producer Price Index for legal services rose an average of 3.76% between 1999 and 2017,³² hourly lawyer wages grew at an average rate of 2.59% over that period, according to BLS data.³³ But this data comes from the Occupational Employment Statistics survey, which does not include benefits, such as health care and retirement plan contributions.³⁴ BLS data from the National Compensation Survey shows that the benefits portion of total compensation for all civilian workers has been rising at a rate of around 3.4% in

³⁰ See U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 138 (1975).

³¹ See Bureau of Labor Statistics, Employment by Major Industry Sector, <https://www.bls.gov/emp/tables/employment-by-major-industry-sector.htm> (showing roughly 1.5% of the labor force employed in agriculture in 2016).

³² See *supra* note 17.

³³ Author's calculations from Bureau of Labor Statistics, Occupational Employment Statistics, <https://www.bls.gov/oes/tables.htm>.

³⁴ See Bureau of Labor Statistics, Occupational Employment Statistics, Frequently Asked Questions, https://www.bls.gov/oes/oes_ques.htm.

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recent years,³⁵ compared to 2.4% for wages and salaries.³⁶ Extrapolating, we can probably assume that overall lawyer compensation grew at closer to 3.6%, very close to the growth rate in the cost of legal services.

IV. Curing the Cost Disease

The previous section argued that the cost disease may help to explain the rising costs of both legal education and legal services, since both are labor-intensive industries not well-suited to the productivity-enhancing technologies that have flourished in some other industries. And the compensation data for law professors and for lawyers also fits reasonably well with that story, with both rising materially faster than overall inflation, and fairly close to the rise in costs for legal education and legal services, respectively, especially when total compensation is considered.³⁷

So far, this story sounds truly bleak—costs for necessary services rising ever-faster, with little that we can do to stop it other than suppressing wage growth or substituting into inferior products or services—more MOOCs and mandatory arbitrations, more adjunct professors and online legal forms. But labeling this phenomenon a “disease” is actually too negative, since it is a product of positive economic forces—productivity and wage growth. Moreover, those same forces can end up curing the cost disease. The same productivity improvements that drive wage growth also create the savings needed to pay for that cost growth—that is, an economy as a whole will always be able to afford cost increases due to the cost disease. The catch is that income and wealth inequality make it such that *a given individual* may not be able to afford the cost increases. Ultimately, the cost disease ends up being a distributional issue that requires us to make difficult choices about whether to limit goods like legal education and legal services only to those with the most resources, or whether to socialize and share some of the costs.

³⁵ Author’s calculations based on Bureau of Labor Statistics, Employer Costs For Employee Compensation, All Civilian Total Benefits for All Occupations, Cost per Hour, 2004-2018, *available at*: <https://www.bls.gov/data>.

³⁶ Author’s calculations based on Bureau of Labor Statistics, Employer Costs For Employee Compensation, All Civilian Wages and Salaries for All Occupations, Cost per Hour, 2004-2018, *available at*: <https://www.bls.gov/data>.

³⁷ It should be noted that professors and lawyers are far from the only people employed in legal education and legal services. But the same general argument applies, since the industries in general are labor intensive—there is not a ton of room for massive productivity improvement among administrative and support employees at law schools, for example.)

A. Enough Money in the Economy

Before turning to the distributional implications of the cost disease, we should understand that rising costs as a result of productivity and wage growth are affordable to the economy as a whole. Recall that the driver of wage growth in this story is rising labor productivity in some sectors of the economy. A given worker, using capital and technological innovation, can produce more output per hour of work, and at least some of that comes back to the worker in the form of higher wages. But those same productivity improvements can also drive down real prices for the goods being produced or otherwise free up economic resources. In essence, the money we save on lower prices for toasters and televisions can be used to pay the higher prices for education and legal services (and health care and other cost disease-afflicted goods and services).³⁸ The overall bundle of goods does not need to change much at all, even if the allocation of money within the bundle changes a lot.

Another way to think about it is that if cost-disease price increases mostly track labor compensation growth—as they do for legal education and legal services—then, on average, people can pay the rising costs out of their rising labor incomes. If for some reason productivity slows such that wage growth slows as well, then that also slows the upward pressure on the costs of labor-intensive services, keeping the services affordable on average.

Now, this is quite obviously a vastly over-simplified story. Three issues in particular make addressing the cost disease much more challenging. First, capital's share of income appears to be rising, in part because capital is taking a bigger share of the gains from productivity improvements than economic theory suggests should happen in a competitive labor market.³⁹ Some suggest this is because of monopsony conditions among employers,⁴⁰ the decline of labor unions,⁴¹ and other factors that limit the bargaining power of labor.⁴² But why it is happening is beyond the scope of this article; I only observe that labor may be capturing less of the rewards of productivity gains in the form of wages than

³⁸ See BAUMOL, *supra* note 21, 43-58.

³⁹ See, e.g., Bureau of Labor Statistics, U.S. Department of Labor, *Labor Share of Output Has Declined Since 1947* (March 7, 2017), available at: <https://www.bls.gov/opub/ted/2017/labor-share-of-output-has-declined-since-1947.htm>; Economic Policy Institute, *The Productivity-Pay Gap* (August 2018), <https://www.epi.org/productivity-pay-gap>.

⁴⁰ See, e.g., Suresh Naidu, Eric Posner & Glen Weyl, *More and More Companies Have Monopoly Power Over Workers' Wages. That's Killing the Economy*, VOX (April 6, 2018), <https://www.vox.com/the-big-idea/2018/4/6/17204808/wages-employers-workers-monopsony-growth-stagnation-inequality>.

⁴¹ See, e.g., Karl Russell, Ben Casselman, Patricia Cohen, Conor Dougherty & Noam Scheiber, *6 Reasons That Pay Has Lagged Behind U.S. Job Growth*, N.Y. TIMES, Feb. 1 2018, available at: <https://nyti.ms/2FAKPGO>.

⁴² See, e.g., *id.*

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we might hope. This may not necessarily be a problem for the cost disease, however, since limited wage growth could also limit price increases in labor-intensive services. But the next point challenges that.

Second, growing inequality, even just in labor income, makes the effects of cost growth different depending on where one is in the income distribution. Professionals and those with college degrees have seen decent wage growth, while worker- and middle-class worker have not.⁴³ So looking only at average wage growth masks important distributional differences. Those most struggling to keep up with cost disease-driven inflation in health care and education are also those who are receiving the least gains from productivity-driven wage growth. At the same time, as we have seen, the wages of those who work in legal education (and higher education generally) and legal services have risen, driving the costs of those services higher.⁴⁴ In other words, the divergence in wage growth between professionals and those with college degrees versus others is not only a driver of inequality in its own right, but also drives further inequality in the ability to afford goods and services affected by the cost disease.

Third, as noted above, much of the growth in total labor compensation has gone to benefits, especially employer-provided health insurance.⁴⁵ So even where labor has captured some of the gains from productivity improvements, those gains have largely gone to pay the rising cost of health care, another service afflicted by the cost disease. Health care is a complicated issue that is (thankfully) beyond the scope of this article, but even if we make the heroic assumption that all of the cost increases in health care are only because of the cost disease (in which case they would not necessarily be a bad thing), the fact that health care is generally paid up-front by employers or through paycheck withholding means that it may partly crowd out other goods and services with rising costs, particular for those with slow or flat wage growth. As evidenced by the slower growth in cash wages, health care's first bite at the apple leaves less for other goods and services

The challenge, therefore, is that while the cost disease story tells us that there ought to be enough resources in an economy to afford rising prices in low-labor productivity growth industries like legal education and legal services, the

⁴³ See, e.g., Elise Gould, *Looking at the Latest Wage Data by Education Level*, Economic Policy Institute Blog (Sept. 1, 2016), <https://www.epi.org/blog/looking-at-the-latest-wage-data-by-education-level>.

⁴⁴ See *supra* notes 28 and 33 and accompanying text; Jay Shambaugh & Ryan Nunn, *Why Wages Aren't Growing in America*, HARV. BUS. REV. (Oct. 24, 2017), available at: <https://hbr.org/2017/10/why-wages-arent-growing-in-america> (noting distribution differences in wage growth).

⁴⁵ See *supra* notes 35-36 and accompanying text; Anna Stansbury & Lawrence Summers, *Productivity and Pay: Is the Link Broken?*, NBER Working Paper No. 24165, at 8-9 & n.7 (2017).

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distribution of those resources among individuals and households can still make some goods and services unaffordable for large swaths of society. Ultimately, the cost disease is not an issue of economic efficiency but rather of equity and fairness.

B. Socializing the Costs

A first-best solution to the distributional issues created by the cost disease is to improve distribution, i.e., to generate policies that drive wage growth, especially in the lower ends of the income distribution.⁴⁶ Barring that, the other choices available are 1) top-down cost controls,⁴⁷ 2) accepting rationing by income, or 3) some socializing of the costs. In my view, the first is unacceptable for economic reasons and the second for justice and fairness reasons, which means we are left with trying to figure out some way to spread the costs across society, to bear them collectively and progressively.

In the context of legal education and legal services, what would this entail? The most basic tool for socializing a good or service in this way is government itself. From a public finance perspective, government is just a group of people coming together to collectively acquire goods and services that the private market cannot provide well or at all.⁴⁸ Government can get around the collective action, asymmetrical information, and intergenerational problems that can lead to market failure, and it can also provide a mechanism—progressive taxation—for paying for goods in a way that is affordable for everyone. If we believe, as I have argued here, that we are under-providing legal services, and therefore also under-providing legal education, in part because of cost pressures that are largely a function of income and wealth inequality, then perhaps government should step in and provide these services directly. All law schools become direct-funded public institutions and all legal services are government provided, with progressive taxes used to pay the associated costs.

Needless to say, there would be a number of problems with this approach. First, the politics of raising taxes and expanding the public sector to that degree

⁴⁶ The growth would have to be significant, since we would need wages to catch up to where they should be to match the growth that has occurred in education and higher education, plus continue to grow along with those costs going forward. This could have the potential to increase cost disease pressures, since presumably at least some of those higher wages would be paid to individuals working in low-productivity industries, driving prices in those industries higher.

⁴⁷ Recall that by assumption I am addressing cost increases due to the cost disease, i.e., due to market-driven wage growth in low-productivity growth industries. To the degree that there are other factors affecting costs, like waste, rent-seeking, or monopoly, other policy tools should be considered.

⁴⁸ For an articulation of this “public finance” view of government, and the competing “public choice” view, *see generally* JAMES M. BUCHANAN & RICHARD A. MUSGRAVE, PUBLIC FINANCE AND PUBLIC CHOICE: TWO CONTRASTING VISIONS OF THE STATE (1999).

are challenging, to say the least. Second, the services would be provided regardless of ability to pay, which could end up being a regressive transfer, or at least more generous to higher-income individuals than necessary, since many of those individuals are inframarginal.⁴⁹ Third, and probably most importantly, it would severely impact that independence of both the academy and the bar, two professions that thrive on freedom from unnecessary government intrusion. For the bar in particular, much of its most important work is challenging unlawful government action; that role could be threatened if every lawyer were an employee of the government.

These are simplistic objections to a simplistic proposal. More sophisticated proposals might generate different responses, but it is not my purposes here to unpack all the possible forms of government funding for these services. Instead, I want to argue that income-contingent loans, as currently embodied in the Education Department's Income-Driven Repayment programs, provide at least a partial pathway to progressive public funding, while avoiding some of the worst objections above.

V. The Partial Solution of IDR and PSLF

The problem as laid out so far is the following: Legal services are a vital and necessary service in our democracy, particular in an era of large government and complex regulation. But our country is far short of meeting the demand for legal services, in part because of the high costs of the labor-intensive service of lawyering. Producing lawyers is also expensive, which in turns exacerbates the cost pressures on legal services, since lawyers may feel the need to recoup the significant private investment they have made in their human capital, while many schools cannot feasibly charge lower their prices. Providing sufficient direct funding to fund both legal services and legal education would be politically and fiscally challenging, and furthermore could undermine the vital independence of both the academy and the bar.

I argue in this Part that income-contingent loans can provide a solution to this problem, even if only a partial and imperfect one. They are not the only solution of course (as this journal issue makes clear), but since they are a policy tool already in place, we should begin to see them not just as a narrow tool to help law and other students afford their student loans, but rather as a broader mechanism to secure sufficient, progressive funding to pay not only or legal education, but legal services in general.

⁴⁹ See John Brooks, Brian Galle & Brendan Maher, *Cross-Subsidies: Government's Hidden Pocketbook*, 106 GEO. L.J. 1229, 1261-66 (discussing the issue and summarizing research).

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In this Part, I first lay out some of the details of the loan programs. They are complex, and I omit some of the fine print here in service of the larger conceptual and policy argument. (I refer interested readers to some of my other work to understand the programs in more detail.⁵⁰) I then explain why these loans can serve as a progressive funding mechanism for legal education and, by extension, legal services. Finally, I take a closer look at the Public Service Loan Forgiveness program in particular and why despite good intentions it does not fit well into this broader conception of the role of income-contingent loans.

A. Income-Driven Repayment Programs

The Education Department has several different programs under the heading of Income-Driven Repayment: Income-Based Repayment (IBR), Pay As You Earn (PAYE), and Revised Pay As You Earn (REPAYE).⁵¹ IBR actually come in two forms, depending on the type and vintage of the loan. And there is also an early, less generous program, Income-Contingent Repayment (ICR), that started in the 1990s, but never had much adoption. Finally, Public Service Loan Forgiveness (PSLF) can also apply to any loan.

This alphabet soup of programs makes summarizing the program details difficult, and mostly beyond the scope of this paper. For our purposes, we can generalize somewhat. First, the programs allow borrowers to make monthly loan payments that are no more than (usually) 10% of “discretionary income,” where discretionary income is (usually) the borrower’s adjusted gross income minus 150% of the relevant poverty threshold.⁵² After 20-25 years (or 10 years for those in PSLF⁵³) any remaining loan balance is forgiven.⁵⁴ The programs differ most substantially in their rules for interest accrual and capitalization, which can make an enormous difference over the life of the loan, even though the rules may not always be clear to borrowers *ex ante*.⁵⁵

Two other differences in the programs are worth mention. First, in all of the programs except for REPAYE, a borrower pays the *lesser* of 10% of

⁵⁰ See Brooks, *The Case for More Debt*, *supra* note 4; Brooks, *Income-Driven Repayment*, *supra* note 4.

⁵¹ See Brooks, *Case for More Debt*, *supra* note 4 at 849-56. for a review of the major features of each program; see also Federal Student Aid, U.S. Dep’t of Educ., Income-Driven Plans, <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven>.

⁵² 34 C.F.R. §§ 685.209(a)(2)(i) (PAYE), 685.209(c)(2)(i) (REPAYE), and 685.221(b)(1) (IBR).

⁵³ 34 C.F.R. § 685.219(c)(1).

⁵⁴ 34 C.F.R. §§ 685.209(a)(6)(i) (PAYE), 685.209(c)(5)(ii)(A) (REPAYE), and 685.221(f)(1) (IBR).

⁵⁵ See Brooks, *Case for More Debt*, *supra* note 4, at 849-56 (reviewing and comparing interest rules).

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discretionary income or the standard loan repayment amount.⁵⁶ So when a borrower's income gets high enough, she reverts to a typical flat loan service schedule. For REPAYE, by contrast, the borrower continues to pay 10% of discretionary income no matter what her income.⁵⁷ Second, for borrowers not in PSLF, the forgiveness of the debt may create gross income for tax purposes, meaning that in practice the full amount of the loan is not really forgiven.⁵⁸ For PSLF, by contrast, the tax code explicitly excludes the amount of canceled debt from gross income.⁵⁹

B. IDR is Progressive Public Funding of Legal Education

The brief sketch of the programs above reveals that the IDR programs can be thought of as a sort of income surtax to pay for higher education.⁶⁰ The government provides the funds for tuition up front, and finances that payment by collecting a percentage of a graduate's income—that is not so far off from the way the government funds its other programs, goods, and services largely through the personal income tax. Of course, there are vast differences between the student loan program and the tax system, especially the facts that future collections from loan borrowers are classified as a “debt,” whereas future tax payments are not, and that the loan repayments end after a period whereas tax obligations do not. But at a high level of generality, income-contingent loans from the government are more analogous to tax payments than they are to, say, standard commercial loans.

If that is so, then IDR provides a form of progressive funding for higher education not so different from, say, free tuition paid for with higher income taxes. And this is particularly true for law schools, and other graduate and professional schools. IDR essentially only applies to federal Direct Loans to students, and Direct Loans to undergraduates are capped at fairly low amounts—a total of \$27,000 for a four-year student who is still a dependent of his or her parents,⁶¹ and a maximum of \$57,500 for an independent student with

⁵⁶ See, e.g., 34 C.F.R. § 685.209(a)(4)(i)(A), (a borrower in PAYE pays no more than what the standard loan payment would be, even if the income-contingent payment would be higher).

⁵⁷ The REPAYE regulations do not include a provision similar to 34 C.F.R. § 685.209(a)(4)(i), *supra*. See Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 39,608, 39,618 (July 9, 2015) (explaining this aspect of REPAYE).

⁵⁸ While this appears to be the accepted view, I think it is wrong as a matter of policy, and is also based on a mis-application of legal precedents. See John R. Brooks, *Treasury Should Exclude Income From Discharge of Student Loans*, 152 TAX NOTES 751 (Aug. 1, 2016) [hereinafter *Student Loan Discharge*].

⁵⁹ I.R.C. § 108(f).

⁶⁰ For expanded arguments on this point see John R. Brooks, *Student Loans as Taxes*, 151 TAX NOTES 513 (Apr. 25, 2016); Brooks, *Income-Driven Repayment*, *supra* note 4, at 258-63.

⁶¹ See 20 U.S.C. §§ 1078(b), 1078-8(d)(3).

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more than four years of schooling.⁶² But as of this writing, graduate and professional students can borrow up to the full cost of attendance,⁶³ an amount which includes not just tuition and fees, but also the student's expected cost of living.⁶⁴ In other words, it is not impossible for a law school to have its entire tuition revenue come from IDR-eligible loans and for all of those loans to be paid back as a percentage of the graduate's income. In that case, the federal government would essentially be taxing the law school's graduates to cover the costs of running the school.⁶⁵

This form of funding should be contrasted with other potential policies to pay for legal education, including direct government funding of schools and direct grants to students. These are already part of the mix of revenue sources used to pay for higher education (along with charitable contributions), so the question is whether direct funding should be relied on more heavily in place of using tuition funding by income-contingent loans. As noted above, the political challenges of direct funding are steep. But it is also debatable whether direct funding would even be desirable.

Direct funding of schools at the levels needed to make up for tuition revenue has the potential to be regressive, since the benefits would accrue to all students, not just those most in need. It would be much more expensive to lower tuitions for everyone than to lower them only for those who cannot afford current tuition levels. Furthermore, much of that money would be wasted on inframarginal consumers, those who do not need additional subsidies to change their behavior.⁶⁶

Similarly, more generous grants to students, while better targeted to those who have greater need *ex ante*, do little to help those who may struggle after graduation. A law student from a poor family may go on to be a big firm law partner, and it is fair and equitable to ask that person to pay for the full cost of their education, rather than ask taxpayers to support her. Income-contingent

⁶² See 20 U.S.C. § 1078-8(d)(4)(B).

⁶³ Direct Loan limits for graduate and professional students are higher than for undergraduates. 34 C.F.R. §§ 685.203(b)(2)(iii), (c)(2) (2018) (annual limit of \$20,500); *id.* at § 685.203(e)(3) (lifetime limit of \$138,500). But graduate and professional students can also take out Grad PLUS loans up to the full cost of attendance, *see* 34 C.F.R. §§ 685.203(f), (g), and those loans are also eligible for IDR, *see, e.g.*, 34 C.F.R. § 685.209(a)(ii) (excepting from IDR only Direct PLUS Loans made to parent borrowers, but not to student borrowers).

⁶⁴ 20 U.S.C. § 1087*ll*.

⁶⁵ More precisely, it would be taxing the pool of all consumers of higher education to pay for all higher education.

⁶⁶ See Brooks et al., *supra* note 49, at 1261-66, and accompanying text.

loans target their benefits to those who have the fewest monetary rewards from their education, paid for by those with the most.⁶⁷

C. IDR Can Be Progressive Public Funding of Legal Services

An argument of this article is that the need for legal services cannot be met with the current supply of lawyers, and this is in part because the cost disease has pushed the costs of legal services out of reach of those who have not seen sufficient wage gains over time, particularly after accounting for the rising costs of other cost disease-afflicted services, especially health care.⁶⁸ In essence, what a large segment of the population is able or willing to pay is not sufficient to pay the costs and meet the wage expectations of a professional with an expensive advanced degree. The implication of this is that to expand the supply of legal services requires at least some socialization of the costs, just as we have partially socialized the costs of health care and higher education.

To be clear, we already do some amount of socialization for legal services. Public defenders and legal aid corporations, for example, provide much needed services to the low-income clients, subsidized by government and private grants. But these do not come close to meeting the needs of clients dealing with family, immigration, disability, housing, or other civil matters where representation is not guaranteed, to say nothing of the often inadequate representation in criminal proceedings.⁶⁹ Moreover, this legal work is partially subsidized by *the lawyers themselves* in the form of lower wages. Government and public interest law jobs generally pay lower salaries than law firms or private practice, and lawyers in private practice that serve low- and middle-income individuals and families make lower salaries than those serving businesses and high net worth individuals and families. This can be seen in part by the well-known bi-modal distribution of starting salaries for lawyers. According to NALP, the average starting salary for the class of 2016 is around \$90,000 but half of all law graduates actually start with an income under \$65,000.⁷⁰ The average is skewed because of a cluster of

⁶⁷ See Brooks, *Income-Driven Repayment*, *supra* note 4, at 268-72.

⁶⁸ Another cost that has grown faster than inflation for many households is the cost of housing. The cost of housing is related to the cost disease, in the sense that construction is labor intensive and has limited opportunities for technological innovation to drive prices down. But market prices seem to be driven much more by scarcity than these more structural reasons, particular in desirable locations like New York City and other major cities. Some zoning rules also have the effect of limiting productivity, since they can impede the ability to build multiple housing units in a single building on a single parcel.

⁶⁹ See LEGAL SVCS. CORP., *supra* note 2

⁷⁰ See, e.g., Judith N. Collins, Jobs & JDs: Employment for the Class of 2016—Selected Findings, Nat'l Ass'n for Law Placement, at 2-3, *available at*: <https://www.nalp.org/uploads/SelectedFindingsClassof2016.pdf>.

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around 16% of law graduates who start out in large firms with starting salaries of \$180,000 or more.⁷¹

Expanding legal services further into under-served areas may require some degree of public or collective funding, but whether or not that is the case, it will almost certainly require attorneys to continue to accept lower wages for these kinds of work. But that is a heavy ask, to put a significant part of the social cost of serving under-served clients onto the backs of the lawyers themselves, particularly when they are also largely responsible for the investment in their human capital. One way to spread at least some of those costs more collectively is through IDR. By shifting some of the costs of legal education off of the lawyers serving the neediest clients and onto more financially successful lawyers (and, by extension, the clients they serve), IDR can lead to somewhat more disposable income for these lawyers, helping to ease some of the pressures of the cost disease on legal services.

To be clear, IDR is not a full solution for dealing with the many problems of access to justice—far from it. But when we recall the deep connection between legal education and legal services, we can see IDR not just as a tool to benefit lawyers, but also as a tool to benefit the communities many lawyers serve. Viewed in this way, IDR is a way of pooling at least some of the costs of ensuring that everyone can navigate our increasingly legalized society and administrative state.

D. The Promise and Problem of Public Service Loan Forgiveness

The argument above—that subsidizing some of the costs of legal education can be a subsidy to expand legal services and access to justice—is also part of the argument behind Public Service Loan Forgiveness.⁷² PSLF stands somewhat apart from the more general IDR programs. IDR applies to all borrowers, while PSLF only applies to borrowers working in particular government or public interest jobs.⁷³ Under general IDR, the borrower pays 10% of their discretionary income and then qualifies for loan forgiveness after 20-25 years (really only

⁷¹ Michael Simkovic and Frank McIntyre have shown that over a career, lawyers still do quite well financially. Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249 (2014). They show that even lawyers in the 25th percentile of earnings over a career make an earnings premium over bachelor's degree holders that likely covers at least the cost of their legal education. *Id.* at 260. But that would not necessarily hold if there were an expansion in the number of attorneys serving needier populations. Their wages would likely be lower than the current average, and the expansion of supply of lawyers could bring down wages for everyone.

⁷² See, e.g., Philip G Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations*, 36 HOFSTRA L. REV. 27 (2007).

⁷³ 34 C.F.R. § 685.219(c)(1).

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partial forgiveness under current law, because the forgiveness is taxable⁷⁴). Under PSLF, the borrower still pays 10% of their discretionary income, but qualifies for forgiveness after 10 years (and the forgiveness is tax free).⁷⁵ Thus, PSLF is substantially more generous than general IDR (particularly because years 11-20 of a lawyer's career are likely to much higher earning than years 1-10).

Critics of IDR suggest that the program is far too generous, especially to lawyers and other professionals,⁷⁶ but it is really the generosity of PSLF in particular that is the source of their concerns. In my view, the generosity of PSLF is not in and of itself a problem—it is quite reasonable for society as a whole to bear the bulk of the cost of developing the skills of a person working in the public interest.⁷⁷ But the *relative* treatment of PSLF borrowers and all other borrowers based on a sharp bright line is less defensible.

First, there is simply the issue of need. Income, as imperfect as it is, is our general metric of a person's need and a person's ability to pay. A lawyer working in the *private* sector making income of \$X has the same need and the same ability to pay as a person working in the *public* sector making income of \$X. In taxation, we look at notions like horizontal equity to determine tax fairness and justice. Our income tax says that by having the same income, these two individuals have the same ability to pay taxes. It is not obvious why that answer should be different for student loans.

Second, if measurement of need cannot explain the different treatment, can we explain it in terms of programmatic goals? That is, can PSLF be defended as a decision to invest more substantial public resources into educating those who work in government or public interest careers compared to the private sector? Perhaps, but the particular choices of how to measure that subsidy are problematic. For one, the sharp line-drawing between what is a "public interest" job and what is not belies a more nuanced reality. As this article has argued, many attorneys in private practice also serve substantial public interests, and we have a public interest in having even more attorneys in private practice. Moreover, it is not clear why the ten-year mark is the point at which to measure the subsidy. If forgiveness were at year 20, and the borrower continued to be in a relatively low-paying job in years 11-20, the income-contingent payments and ultimate forgiveness would still be generous. But if a borrower ends up having a more lucrative later career, some of that value could be captured through higher payments in years 11-20. Finally, many people—not just lawyers—may

⁷⁴ See *supra* notes 58-59 and accompanying text.

⁷⁵ See *supra* notes 53 & 58 and accompanying text.

⁷⁶ See, e.g., Jason Delisle & Alexander Holt, New Am. Found., *Safety Net Or Windfall?: Examining Changes To Income-Based Repayment For Federal Student Loans*, at 10 (2012), <https://www.newamerica.org/education-policy/policy-papers/safety-net-or-windfall>.

⁷⁷ See Brooks, *Income-Driven Repayment*, *supra* note 4, at 264-67.

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move between the private and public sector throughout their careers, and it is not obvious to me that requiring ten years of strict public service work (and/or the hassle of moving between different repayment programs) creates the right incentives.

In part, these first two points collapse into one. The measurement both of a person's need and of how much a person is sacrificing from their own earnings to contribute to the public good are both captured (albeit imperfectly) by the person's income. Attempting to further differentiate requires the sort of line-drawing that PSLF does. By its nature, that sort of line-drawing will be imperfect, and introduces massive differences in treatment based on formalistic distinctions. As of the first quarter of 2018, about one-third of all applications for PSLF had been denied, according to the Education Department.⁷⁸ Even if some of those applications were shots in the dark, it is likely that a significant number of borrowers mistakenly believed that they qualified, or (worse) that the approval process is broken. Looking only at income provides a fairer and more objective measure than a bureaucracy (typically at a private loan servicing company) trying to apply a flawed definition of "public interest."⁷⁹

Third, if we cannot differentiate the two based on need and programmatic goals, we have to look to more subjective notions like merit and desert—one of these lawyers simply deserves a more generous transfer because of the meritorious choice to work in the public interest (even if we could define that well). I think the moral weakness of this position speaks for itself, particularly because the underlying structure of the student loan program means that these benefits go disproportionately to those with graduate and professional degrees, rather than the many others who also work in the public interest.⁸⁰

Finally, and more practically, the gulf between the treatment of PSLF and other IDR borrowers opens up the broader IDR program to political attack,⁸¹ and the cost of PSLF limits the ability to expand IDR into other areas. I have

⁷⁸ Federal Student Aid, U.S. Dep't of Educ. *Public Service Loan Forgiveness Employment Certification Forms Report*, <https://studentaid.ed.gov/sa/about/data-center/student/portfolio>.

⁷⁹ See Ron Lieber, *A Student Loan Nightmare: The Teacher in the Wrong Payment Plan*, N.Y. TIMES (Oct. 27, 2017), available at: <https://nyti.ms/2yRpsyN>.

⁸⁰ Recall that the limits of the underlying federal Direct Loans mean that IDR benefits for those with only undergraduate loans are also limited. See *supra* notes 61-63 and accompanying text. Thus a person with only an undergraduate degree working in the public interest implicitly is asked to pay more of the cost of her education than a similar person with a graduate or professional degree.

⁸¹ See, e.g., DELISLE & HOLT, *supra* note 76; John R. Brooks, *Don't Let the GOP Dismantle Obama's Student Loan Reforms*, N.Y. TIMES (April 9, 2018), available at: <https://nyti.ms/2GI9WMQ>; Jason Delisle, *The Coming Public Service Loan Forgiveness Bonanza*, Brookings Institution Evidence Speaks Report (Sept. 22, 2016), available at: <http://brook.gs/2cpk5yW>.

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argued elsewhere both for expanding the amount of IDR-eligible debt that is available to undergraduates⁸² and for excluding the forgiven debt from gross income for tax purposes.⁸³ Both would likely have some fiscal cost, and reforming PSLF is a compelling way to offset those costs. Reform of PSLF could also allow more targeted benefits to the neediest borrowers in general IDR, such as using a graduated repayment rate structure instead of the current flat 10% rate. While a full consideration of possible reforms to PSLF and IDR is beyond the scope of this article, unpacking the economic, policy, and moral arguments undergirding IDR will be a necessary part of that project.

VI. Conclusion

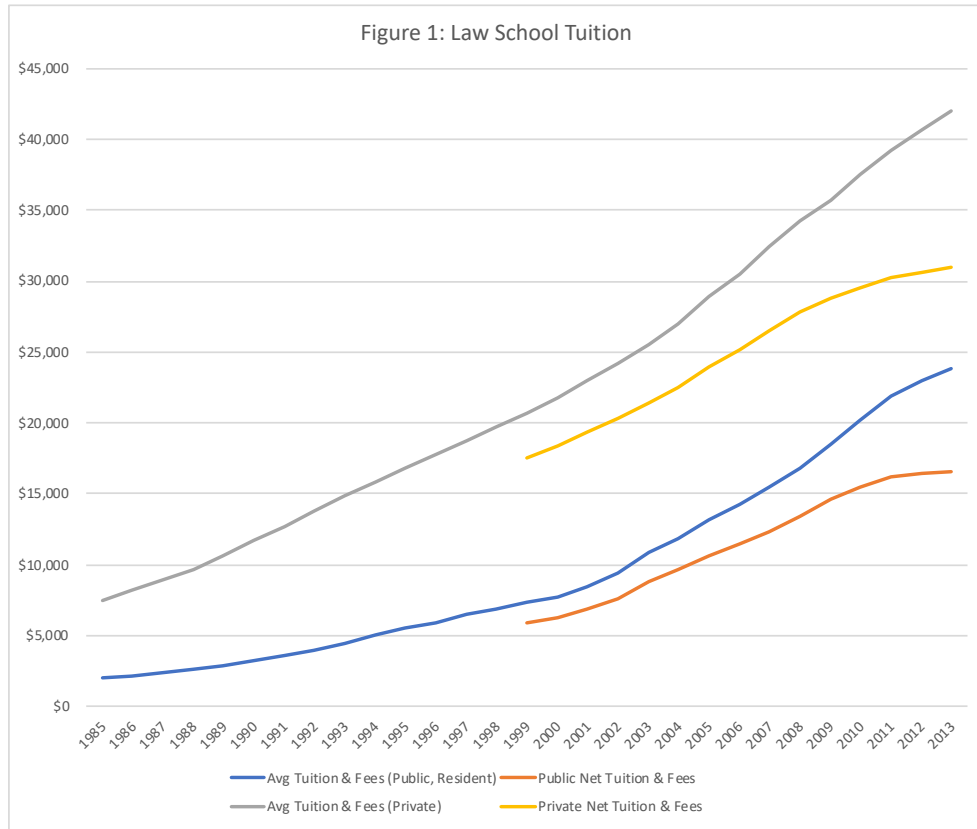
Legal education and legal services are, by their very nature, expensive, and those high costs pose a deep threat to justice. Our increasingly complex, regulatory, and legalized world requires the mediation of professionals trained to navigate complicated legal and regulatory systems, but the high cost of training and retaining lawyers means that many individuals and households go without, and the systems intended to ensure broad welfare and shared prosperity go unattended. The cost disease has a very real effect not just on economic justice, but on civil and legal justice as well.

Addressing these issues will require multiple solutions, but we should recognize that we already have in place a tool that could effectively provide progressive, public funding of legal education—a tool to help cure the cost disease. Income-Driven Repayment, by tying student loan payments to income and forgiving loans after a period of time, helps to ensure that legal education is affordable to anyone, regardless of their ultimate practice area or even career. And that, in turn, can mean more lawyers working in the public interest and serving moderate-income households. Income-contingent loans are not, and cannot be, the only solution, but any broader reform must consider their *already* central role in financing legal education and legal services.

⁸² Brooks, *Case for More Debt*, *supra* note 4.

⁸³ Brooks, *Student Loan Discharge*, *supra* note 58.

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